



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

repair, but the reasoning of the principal case indicates that he may not so claim. Furthermore, the theory of the principal case emphasizing as the determining factor the nature of the contract rather than the place of work casts some doubt upon the right of an employee working under a maritime contract to claim compensation when injured on shore.¹⁰

W. N. K.

CONSTITUTIONAL LAW: DUE PROCESS: EQUAL PROTECTION: VALIDITY OF STATUTE FORBIDDING USE OF INJUNCTION AGAINST PICKETING—First the Hitchman case,¹ then the Duplex case,² and finally the Tri-City decision³ gave the United States Supreme Court ample opportunity to formulate its position with respect to certain of the mooted problems of labor law.⁴ With the possible exception of the Tri-City case, all of these were decided adversely to labor. The Tri-City case itself was a compromise decision, pleasing neither side; for in it the Supreme Court, while holding that picketing carried on by means of "dogging and importunity" was tortious, even though unaccompanied by direct violence or express threats thereof, at the same time held that the mere attempt to persuade and inform under circumstances conclusively negating any implication of violence—which, in application to the facts of that case it interpreted to mean a single picket at each point of ingress and egress—was legal.

These cases, important as they are, shrink into insignificance in comparison with the recently decided *Truax v. Corrigan*,⁵ on all hands recognized as marking an epoch in constitutional law. The facts in this case are as follows: An Arizona statute,⁶ adopted

¹⁰ It is interesting to note that in the principal case the "saving clause" is left wholly out of account. See 6 California Law Review, 69, 71.

¹ *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U. S. 229, 62 L. Ed. 260, 39 Sup. Ct. Rep. 65, L. R. A. 1918C 497, Ann. Cas. 1918B 461, dealing with the extension of the doctrine of *Lumley v. Gye*. This case has recently been limited by a decision of the Circuit Court, *Gasaway v. Borderland Coal Corp.* (Chicago Legal News for December 22, 1921). See note, 35 Harvard Law Review, 459.

² *Duplex Printing Company v. Deering* (1920) 254 U. S. 443, 65 L. Ed. 176, 41 Sup. Ct. Rep. 172, interpreting the Clayton Act so as to deny labor the right to the secondary boycott.

³ *American Steel Foundries v. Tri-City Central Trades Council et al* (1921) U. S. Adv. Ops. 1921-22, p. 103, 42 Sup. Ct. Rep. 72.

⁴ For an account of recent labor litigation, see note, 10 California Law Review, 82, and references there cited.

⁵ (Dec. 19, 1921) U. S. Adv. Ops. 1922, p. 132, 42 Sup. Ct. Rep. 124.

⁶ Arizona Civil Code, 1913, Paragraph 1464: "No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at

in 1913, forbade the use of the injunction against "peaceful picketing." The Arizona Supreme Court held the statute constitutional, and refused the application of Truax for an injunction against picketing strikers, on the ground that the picketing involved was of the peaceful variety within the protection of the statute.⁷ The exact nature of the picketing, as alleged by plaintiff, embraced the display of banners, the dissemination of handbills, and libelous and threatening language. No direct physical violence was charged. On appeal to the United States Supreme Court it was held, in a five to four decision, Justices Brandeis, Pitney, Clarke and Holmes dissenting, (1) that the Arizona statute, as interpreted by the Arizona Supreme Court, was intended to legalize completely the sort of acts here charged; (2) that, so interpreted, the statute worked a deprivation of property without due process; (3) that even if the statute be considered not as depriving plaintiff of all remedy for the acts here committed, but only of the remedy of the injunction, it is invalid under the equal protection clause.

The process of reasoning whereby the court comes to the conclusion that the statute, if intended to deprive plaintiff of all remedy, is a deprivation of property without due process of law, is as follows: Business is property, and while property is subject to regulation, and while no one has a vested interest in the rules of the common law, yet, the legislature cannot, under the guise of such regulation, change the rules of the common law where such change involves a destruction of *fundamental* rights of property; and, finally, that it is one of the fundamental rights of property to be protected not only from direct violence but also from "moral coercion" such as was alleged to have been practised here.

It has been pointed out that this part of the decision is really dictum, inasmuch as the only point at issue is not whether plaintiff is entitled to protection of some sort, but whether he is entitled to the special remedy of an injunction.⁸ Nevertheless, with an eye to the future, the court's position is worth analyzing. The majority opinion, written by Chief Justice Taft, describes the picketing as being "not a mere appeal to the sympathetic aid of would-be customers" but as "compelling every customer or would-

law, . . . And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person, to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising or persuading others by peaceful means so to do; . . ." Similar statutes exist in other states; Washington Laws 1919, Ch. 186; Oregon Laws 1919, Chapter 346. A similar statute in California was held unconstitutional in *Goldberg v. Stablemen's Union* (1906) 149 Cal. 429, 86 Pac. 806.

⁷ *Truax v. Corrigan* (1918) 20 Ariz. 7, 176 Pac. 570.

⁸ See exhaustive note in 31 *Yale Law Journal*, 408.

be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks, and fear of injurious consequences illegally inflicted."⁹ This is lumping together indiscriminately quite different things. If the decision that the rights involved here are fundamental refers to the right to redress for libel and protection against threatened violence masquerading under words of persuasion, no fault is to be found. But it is decidedly otherwise as to the "aggressive and annoying importunity" and the "gauntlet of most uncomfortable publicity." Far from being fundamental, the right to redress in such borderline situations is scarcely, if at all, established: in those many states which hold "peaceful picketing" legal, there is a more or less complete failure to define the term so as either to include or exclude this type of action.¹⁰ Outside the labor field, the question has scarcely arisen.¹¹ True, the Tri-City case decided that "dogging and importunity" were tortious; but it is one thing for the Federal courts to establish their own rules of tort-liability—and quite another to hold that this Federal rule of tort-liability, established but yesterday, is one of fundamental right, which all jurisdictions are obliged by the Constitution to follow.

The main question in the case, however, and the one involving the gravest practical issues, relates to the equal protection clause. The court states that even if the Arizona statute be considered merely as a denial, not of all remedy, but only of injunctive relief, it is invalid because it establishes one law for strikers and another for all other persons committing the same tortious acts.¹² In answer to the contention that the equal protection clause is not infringed by reasonable classification, and that the employer-employee relation is a reasonable basis of classification here, the majority opinion contains not one word of substantive argument. There is merely the reiterated dogmatic statement that

⁹ The court holds that it is not bound by the finding of the Arizona Supreme Court as to the facts, and decides that the picketing here was violent, in spite of the finding of the Arizona court that the picketing here was peaceful. This seems a well-established and a proper rule. See cases cited in opinion.

¹⁰ The rule in jurisdictions holding that peaceful picketing is lawful, is stated by Martin, *Modern Law of Labor Unions*, p. 233, as follows: "... picketing if not conducted in such numbers as will of itself amount to intimidation, and when confined to the seeking of information . . . and to the use of peaceful argument and entreaty . . . is lawful." This statement is typical, and leaves undecided, as will be seen, just what acts do constitute peaceful picketing. See note, 10 *California Law Review*, 82.

¹¹ Query, whether the importunities of newsvendors, salesmen, solicitors, etc., constitute technical torts. The point seems untouched by authority.

¹² The dissenting opinion of Justice Pitney points out and stresses that even though the statute discriminated unduly in favor of strikers such discrimination could not properly be set up by the plaintiff employer, for the reason that he is not a member of the class discriminated against. It is only third parties, belonging to classes denied this exemption afforded strikers, who can plead equal protection, according to his view. His dissenting opinion leaves little doubt as to the correctness of his contention, although, of course, it might be answered that it is always within the province of the court to make new law.

such a basis is here "unreasonable" although admittedly proper in other connections, such as Employers' Liability statutes.

The dissenting opinions analyze the problem in substantially the same manner as the majority of the court; they apply the same test—that of reasonableness; but, for solid reasons, the most striking of which is the fact that the remedy of the injunction is peculiarly liable to abuse in the heat of industrial conflict, they come to an exactly contradictory conclusion, viz., that the classification is "reasonable."¹³

Thus we are met by what looks like a square conflict of views on a question of fact. In reality, however, the divergence is due to the fact that under cover of the ample vagueness of the word "reasonable" there are concealed two entirely distinct tests of constitutionality. As applied by Justice Holmes, the test requires merely that the law be not palpably arbitrary and capricious.¹⁴ As applied by Chief Justice Taft, the test of "reasonableness" is a nebulous concept. Hazarding a definition from the nature of the results of its application, we may say it requires that the statute be in close harmony with the status quo.¹⁵ The first interpretation reduces personal and accidental factors to a minimum; the second tends to reduce the term "reasonable" to an empty phrase to be filled by the sympathies, policies and prejudices of the judges who happen to be sitting in the case. A review of citations would convince any impartial student that Justice Holmes has the overwhelming weight of authority and the modern tendency in constitutional law on his side; but after all, it is idle to ask which of these views is technically "right" and which "wrong." Policy, not logic, must be our guide. The view which we associate with the name of Justice Holmes is forward-looking; that of Chief Justice Taft sets us back a generation in the slow movement of social advance.¹⁶

¹³ As indirect evidence of the reasonableness of the statute, Justice Brandeis points to the fact that similar methods have been adopted in England (The Trades Disputes Act, 1906, 6 Edw. VII, Chap. 47); that the introduction of the use of the injunction in labor disputes is comparatively recent, and was installed only after bitter struggle; that other state legislatures adopted similar statutes; that public opinion is divided as to the propriety of the use of the injunction here; and finally, that the use of the injunction has been limited in other directions on the ground of public policy.

¹⁴ *Carroll v. Greenwich Ins. Co.* (1905) 199 U. S. 401, 50 L. Ed. 246, 26 Sup. Ct. Rep. 66; *Quong Wing v. Kirkendall* (1911) 223 U. S. 59, 56 L. Ed. 350, 32 Sup. Ct. Rep. 192. For an excellent statement of the test, and the vagueness inherent in it, see *Magoun v. Illinois Trust & Savings Bank* (1897) 170 U. S. 283, 293ff, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 549.

¹⁵ "The constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual." This excerpt of the opinion of the Chief Justice—in itself a mere statement of a general truth—illustrates the point of view from which he approaches the problem.

¹⁶ The issue here is reminiscent of the *Lochner* case, holding a ten-hour law for bakers invalid, on the ground that it was an "unreasonable" exercise of police power; *Lochner v. New York* (1904) 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539. Ultimately, it is a contest between two theories of law—the evolutionary and the static. The real issue was faced years ago by

Meanwhile, wise or unwise, the decision remains an established fact. Its great importance lies not in the point immediately decided—i. e., that strikers cannot be specially exempted from the use of the injunction—but in the broad principle which it lays down in support of its decision, viz., that strikers may not be selected as a special class for peculiar regulation. If this is true with respect to a change in remedial law, such as the use of injunctions, it must necessarily be true likewise of a change in substantive law relating to torts committed by strikers. Hence it would prohibit the legislature from, for instance, exempting strikers from the operation of the doctrine of *Lumley v. Gye*, as has been done in England, under the Trades Disputes Act.¹⁷ And if it is true of individual rules of remedial and substantive law, would it not be held to be true likewise of the attempt to install an entire special system for the regulation of strikers, such a system being merely a complex of changes in individual rules? Undoubtedly we are confronted here with a problem of the first magnitude, which cannot be long evaded. If interpreted as suggested above, the decision would mean that systems of compulsory arbitration, such as are being tried in Kansas¹⁸ and Colorado,¹⁹ are unconstitutional, in that they subject strikers to special regulation. To follow such a doctrine would be a deplorable result socially, and one for which we cannot plead any manner of technical necessity. It is to be doubted, however, whether the court will push its logic so far. In all likelihood, it will be apt to find a reasonable basis of classification for industrial statutes the policy of which it approves.

H. R.

CONSTITUTIONAL LAW: EQUAL PROTECTION: ALIEN LAND LAW—The doubt of Mr. Justice Miller in the *Slaughter House Cases*, as to whether any state action not a discrimination against negroes would ever be held to come within the purview of the equality provisions of the Fourteenth Amendment to the Federal Constitution,¹ has been nowhere so thoroughly dispelled as in the western states, where a series of adjudications has definitely estab-

Justice Holmes, and squarely answered in his dissent in the *Lochner* case, by the assertion that "... a constitution is not intended to embody a particular economic theory. . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

¹⁷ *Supra*, n. 13.

¹⁸ *State v. Howat* (1921) 198 Pac. 686 (Kan.).

¹⁹ *People v. United Mine Workers of America* (1921) 201 Pac. 54 (Colo.).

¹ "We doubt very much whether the action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." (1872) 83 U. S. (16 Wall.) 36, 81, 21 L. Ed. 394.